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No. 334

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

HANS REES' SONS, INC.,

Appellant,

v.

STATE OF NORTH CAROLINA ON THE RELATION OF ALLEN J. MAXWELL, COMMISSIONER OF REVENUE,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

STATEMENT OF JURISDICTION UNDER RULE XII.

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Appellant submits the following statement of the basis on which it is contended this Court has jurisdiction to review, on appeal, the judgment of the Supreme Court of the State of North Carolina.

(A)

The statutory provisions believed to sustain the jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended by Act of February 13, 1925, Chapter 229, 43 Stat. 937, U. S. Code, Ann. Title 28, Sec. 344.

The judgment of the Supreme Court of North Carolina is a final judgment in the suit under Article IV, Sections 2 and 8 of the Constitution of the State of North Carolina and Sections 615, 658, 659, 1412 and 1314 of North Carolina Code as construed in *Chavis* v. *Brown*, 174 N. C. 122.

(B)

The date of the judgment and of the application for appeal.

The decree sought to be reviewed was entered in the Supreme Court of the State of North Carolina on the 16th day of June, 1930 (R. 191).*

The petition for appeal (R. 192), assignment of errors (R. 193) and prayer for reversal (R. 195) were presented to the Chief Justice of the Supreme Court of the State of North Carolina on the 18th day of July, 1930, and the order allowing said appeal was issued (R. 199) and the appeal bond approved (R. 196) by him on the said 18th day of July, 1930. The citation on appeal (R. 203) was signed by him on the 18th day of July, 1930, and was served upon the appellee on the 25th day of July, 1930 (R. 203).

(C)

Nature of the case and rulings below.

The case was brought by appellant, a New York corporation, to recover income taxes imposed by the State of North Carolina.

(* All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of the State of North Carolina and on file with the Clerk of this Court. The record has not yet been printed in this Court.)

Appellant is engaged in the manufacture and sale of leather and operates two factories, one in North Carolina and one in New York.

North Carolina has collected annual taxes upon 80% of the appellant's total net income, while appellant contends that only 17% of such income was derived from its operations in that State.

The principal question litigated in the court below and involved in this appeal is the constitutional validity of the North Carolina statute, which provides an inflexible rule of apportioning corporate income subject to the income tax, and which, as applied to the appellant, has resulted in an unreasonable and arbitrary tax.

Taxes for the years 1923, 1924, 1925 and 1926 are involved. The taxes for the first two years were imposed under Section 201, Chapter 4 of the Public Laws of North Carolina of 1923, and for the latter two years under Section 201, Chapter 101 of the Public Laws of North Carolina of 1925. The Laws of 1925 amended the earlier Section in matters not relevant to any questions involved in this case. The State Court has considered the entire matter to depend upon the validity of the Act of 1925, which reads as follows:

> "CORPORATIONS. Every corporation organized under the laws of this State shall pay annually an income tax, equivalent to four per cent. of the entire net income as herein defined, received by such corporation during the income year; and every foreign corporation doing business in this State shall pay annually an income tax equivalent to four per cent. of a proportion of its entire income to be determined according to the following rules:
>
> "(a) In case of a company other than companies mentioned in the next succeeding section, deriving profits principally from the ownership,

sale or rental of real estate or from the manufacture, purchase, sale of, trading in, or use of tangible (personal) property, such proportion of its entire net income as the fair cash value of its real estate and tangible personal property in this State on the date of the close of the fiscal year of such company in the income year is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deductions on account of incumbrances thereon.

"(b) In case of a corporation deriving profits principally from the holding or sale of intangible property, such proportion as its gross receipts in this State for the year ended on the date of the close of its fiscal year next preceding is to its gross receipts for such year within and without the State.

"(c) The words 'tangible personal property' shall be taken to mean corporeal personal property, such as machinery, tools, implements, goods, wares and merchandise and shall not be taken to mean money deposits in bank, shares of stock, bonds, notes, credits or evidence of an interest in property and evidences of debt."

Appellant followed the statutory procedure for the review of the taxes by the Commissioner of Revenue of the State of North Carolina with an appeal from his decision to the Superior Court of Buncombe County, North Carolina, where the case was tried *de novo*, and resulted in a judgment against the taxpayer.

From this judgment an appeal was taken to the Supreme Court of North Carolina, which is the highest court in the State, and that Court entered final judgment affirming the judgment of the Superior Court, upholding the constitutional validity of the statutes involved and dismissing the case.

The appellant has throughout all these proceedings challenged the constitutionality of the statute (Petition for Review, R. 1, 9; Exceptions to Findings of Commissioner, R. 77, 101; Appeal to Superior Court, R. 104; Assignment of Errors, State Supreme Court, R. 173; Opinion of State Supreme Court, R. 184).

The statute provides an apportionment of income in accordance with the location of tangible property owned, and disregarding all other factors or considerations. The appellant introduced exhaustive evidence as to the character of its business and the sources of its income, and showed that as applied to it the statutory allocation of tangible property owned alone produced an unreasonable result (R. 109 to 165, inclusive). The effect of the evidence was to show that for the four years the average income of appellant derived from North Carolina sources amounted to approximately 17% of its total income (R. 154 to 158; Opinion, R. 188).

This evidence was received under a stipulation waiving objections to relevancy and competency, but reserving objection on the ground of materiality (R. 109). At the close of the case in the Superior Court all of appellant's evidence was stricken out as immaterial (R. 173).

The opinion of the Supreme Court considered two questions: One, whether or not the statute was unconstitutional on its face, and, second, whether or not evidence showing that the statute operated unfairly to the appellant was material to the case (R. 180 to 190).

The following quotation from the opinion of the State Supreme Court presents the constitutional question:

> "Without burdening this opinion with detailed compilations set out in the record, the evidence offered by the petitioner tends to show that for the

years 1923, 1924, 1925, and 1926, the average income having its source in the manufacturing and tanning operations within the State of North Carolina was seventeen per cent." (R. 188).

The Court, nevertheless, held that this evidence was immaterial in face of the fact that under the statutory allocation the appellant had been taxed upon 80% of its income.

The constitutional questions that appellant contends give this Court jurisdiction of this case are, therefore, as follows:

1. Is a state income tax law constitutional which apportions income on the basis of location of tangible property owned alone and which, as construed and applied to appellant, imposes a tax upon 80% of its income, while in fact only 17% of such income is derived from business or operations in the state?

2. Can the constitutional invalidity of the statute be avoided by excluding as immaterial evidence showing the arbitrary and unreasonable application of the statute to the taxpayer?

These questions were expressly left undecided by this Court in *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113.

The judgment appealed from is a final judgment of the Supreme Court of North Carolina which is the highest court in the State having jurisdiction of the case. (Order Allowing Appeal, R. 199; State Constitution and statutes cited above in (A).)

(D)

Cases believed to sustain jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Fisk v. *Kansas*, 274 U. S. 380, 385;
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282;
Cudahy Co. v. *Parramore*, 263 U. S. 418, 422;
Kansas City So. Ry. Co. v. *Road Improvement Dist.*, 266 U. S. 379, 385;
Nashville, Chattanooga & St. Louis Ry. v. *White*, 278 U. S. 456;
Safe Deposit & Trust Co. of Baltimore v. *Virginia*, 280 U. S. 83.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

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Counsel for Appellant.